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Task 2421

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**To:** "Mary Ann Wright" <maryannwright@utah.gov>, "Pam Grubaugh-Littig" <pamgrubaughlittig@utah.gov>  
**Date:** 8/28/2006 5:05:39 PM  
**Subject:** UEI Comments, Supplemental Cultural Survey Requirements, Lila Canyon Extension

Mary Ann and Pam, attached on behalf of UtahAmerican Energy, Inc are comments of UEI and Montgomery Archeological Consultants regarding the Division's Supplemental Cultural Survey Requirements. Thanks for your consideration in this matter.

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**CC:** "Dave Shaver" <dshaver@UtahAmerican.com>, "Marshall, Jay" <jmarshall@coalsource.com>, "Jody Patterson" <jpatterson@montarch.com>, <kmontgomery@montarch.com>, "Steve Alder" <STEVEALDER@utah.gov>

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August 28, 2006

*Via E-Mail and U.S. Mail*

Mary Ann Wright  
Pamela Grubaugh-Littig  
Utah Division of Oil, Gas & Mining  
1594 West North Temple, Suite 1210  
P.O. Box 145801  
Salt Lake City, Utah 84114-5801

**RE: Division's Proposed Supplemental Survey Requirements – Lila Canyon  
Extension, UtahAmerican Energy, Inc., Horse Canyon Mine C/007/0013**

Dear Mary Ann and Pam:

On behalf of UtahAmerican Energy, Inc. ("UEI"), this letter responds to the Division's letter dated August 16, 2006, and to the Southern Utah Wilderness Alliance ("SUWA") letter dated August 24, 2006, regarding proposed supplemental cultural survey requirements for the Lila Canyon Extension. UEI has reviewed these issues with their consultant, Montgomery Archeological Consultants ("MOAC") and we have the following comments:

The first condition of the supplemental survey concerns additional archaeological inventory along either side of Little Park Wash and its main unnamed tributary in Section 13, Township 16 South, Range 14 East. Please note, that as part of an unrelated project, MOAC previously surveyed a significant portion of this proposed area (see attached map). This survey, State No. U-04-MQ-1107b, resulted in the identification of no cultural resources. This inventory was inadvertently omitted from the file search results and will be provided to the Division.

SUWA states at paragraphs 2 and 4 of its letter that the corridor width should be increased, the transect interval should be at three meter intervals and that they are unclear on MOAC's transect interval in the original sample survey. MOAC responds that the three meter transect interval is unnecessary for two reasons. First, BLM's *Guidelines for Identifying Cultural Resources*, state that transect intervals should be "commensurate with the number and kinds of cultural properties known or expected to occur . . ." MOAC indicates that sites previously identified in the project area and adjacent areas far exceed ten meters in their shortest dimension. Second, there is no data to support SUWA's suggested reduction in transect size. SUWA also stated that they could not determine the transect interval used by MOAC in its recent report. MOAC responds that it identifies this transect interval on page 7 of its report which states that the survey was conducted by "walking transects spaced no more than 10 meters (30 feet) apart."

**Snell & Wilmer**  
LLP

Mary Ann Wright  
Pamela Grubaugh-Littig  
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SUWA's comment 5 asserts that inventories within the project area conducted prior to 1995 are inadequate. In response, MOAC states that this is an assumption that has never been studied or verified. MOAC notes that the goal of an archaeological inventory is not to identify every resource, but to identify the nature, type and densities of those resources so that land managers can more effectively manage public lands. In MOAC's opinion, there is no evidence to suggest that the University of Utah survey is inherently flawed simply due to its early date of completion. On the contrary, the results of the sampling recently conducted by MOAC support the findings of the original survey as to low site densities. Based on their reading of the original report, other cultural resource inventories in the vicinity, and the results of their own study, MOAC could find no reason to reject the previous inventory as inadequate.

In regards to SUWA's Comment 6, MOAC responds that it has conducted numerous literature searches, literature reviews, online database searches (e.g., National Register and Land patent records), and has examined GLO maps and other appropriate documentation (e.g., Class I literature reviews) regarding the survey area. During this process, MOAC identified no information pertinent to eligibility recommendations of the documented sites. Their finding in this regard is consistent with a recent Class I literature review conducted by Jerry Spangler, on behalf of SUWA.

SUWA's last comment focuses on the incorrect assertion that a Class III inventory of the area is required by Section 106 of the National Historic Preservation Act. A Class III inventory is among several other strategies that can be employed to fulfill the requirements of the law. SUWA purports to support the Class III inventory requirement with its own Petition to Designate Certain Lands as Unsuitable for Coal Mining Operations filed with the federal Office of Surface Mining ("OSM") on July 24, 2006. OSM rejected SUWA's petition by Decision dated August 24, 2006, enclosed.

We appreciate your consideration in this matter.

Very truly yours,

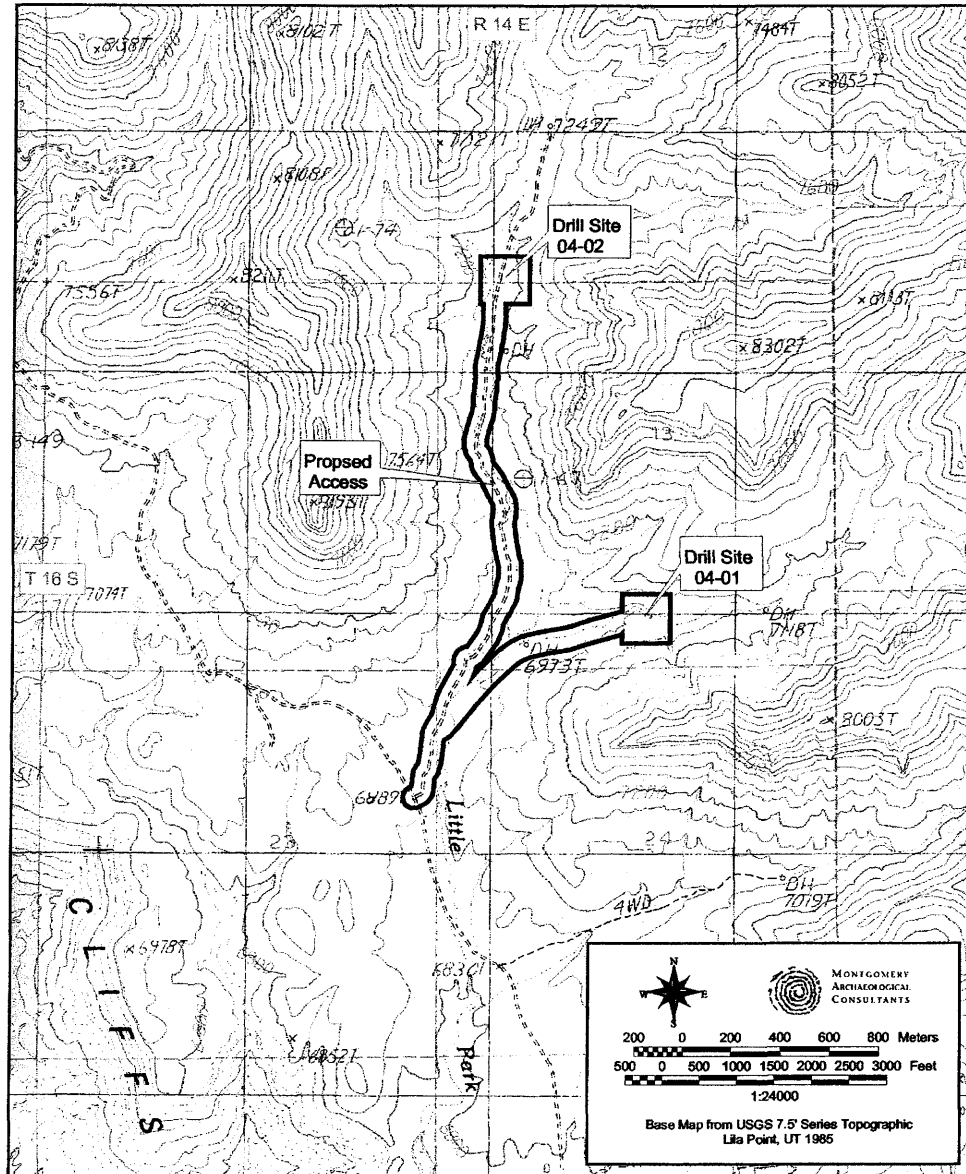


Denise A. Drago

DAD:jmc:410650

Enclosures

cc: Dave Shaver (via e-mail)  
Jay Marshall (via e-mail)  
Jody Patterson (via e-mail)  
Keith Montgomery (via e-mail)  
Steve Alder, Esq. (via e-mail)



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IN REPLY REFER TO:

**United States Department of the Interior**

OFFICE OF SURFACE MINING  
Reclamation and Enforcement  
P.O. Box 46667  
Denver, Colorado 80201-6667

August 24, 2006

Stephen Bloch, Staff Attorney  
Southern Utah Wilderness Alliance  
425 East 100 South  
Salt Lake City, Utah 84111

Dear Mr. Bloch:

The Office of Surface Mining (OSM) has completed its review of the petition to designate all lands lying within the zone of subsidence of the proposed Lila Canyon Extension to the Horse Canyon Mine (Permit Area B) as unsuitable for surface coal mining operations.

Based on our review, pursuant to 30 CFR §769.14(g) OSM has determined that it will not process SUWA's petition to designate the Lila Canyon Extension to the Horse Canyon Mine as unsuitable for surface coal mining operations. The enclosed response explains our determination not to process the petition.

We thank you for the opportunity to consider the petition.

Sincerely,

*James F. Fulton*  
James F. Fulton, Chief  
Denver Field Division

Enclosure

cc w/enclosure: Al Klein, WRO  
John Kunz, SOL

TAKE PRIDE  
IN AMERICA

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## **Response to Petition to Designate Lands as Unsuitable for Surface Coal Mining Operations**

August 24, 2006

### **Introduction**

On July 25, 2006, the Office of Surface Mining's (OSM) Denver Field Division (DFD) received a petition to designate all lands lying within the zone of subsidence of the proposed Lila Canyon Extension to the Horse Canyon Mine ("subject lands") as unsuitable for surface coal mining operations. The petition was submitted by the Southern Utah Wilderness Alliance (SUWA). SUWA urges the Secretary to designate the subject lands as unsuitable for surface coal mining operations because such lands are either known to contain or likely to contain a significant number of historic and prehistoric sites.

SUWA's petition covers 5,544 acres contained within six Federal leases currently held by UtahAmerican Energy, Inc. (UEI). The permit area is comprised of two permit areas: Permit Area A (the Horse Canyon Mine); and Permit Area B (the proposed Lila Canyon Extension).

### **Petitions for Designating Lands Unsuitable for Mining**

Section 522(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) allows any person having an interest which is or may be adversely affected to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations. The specific procedures for processing such petitions are found in 30 CFR Parts 764 (State process) and 769 (Federal process).

The Federal regulations at 30 CFR §769.14(g) read as follows:

OSM may determine not to process any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published. Based on such a determination, OSM may issue a decision on a complete and accurate permit application and shall inform the petitioner why OSM cannot consider the part of the petition pertaining to the proposed permit area.

This rule "...is the result of the reasonable exercise of OSM's discretion in implementing the Act," and "...will strike a fair balance between the petitioner's interest and an operator's commitment to mine." 48 FR 41333 (Sept. 14, 1983).

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### Findings and Analysis

The preamble language to 30 CFR §§764.15(a)(7) and 769.14(g) is instructive in determining whether to process a lands unsuitable petition once a permit application has been filed and the first newspaper notice has been published. The preamble language to section 769.14(g) does not contain any instructive language per se, but refers the reader to the preamble language to Part 764. Specifically, this language states that 30 CFR §769.14(g) was "...proposed to protect the interests of operators who have invested significant expense and time in preparing and submitting extensive documentation and information required for a permit application." 48 FR 41332 (Sept. 14, 1983). Moreover, in responding to a comment that this provision (30 CFR §769.14(g)) would unjustly preclude petitioners from the petition process because of inadequate knowledge of the permit status, OSM noted that "...the provision recognizes the time after which the filing and consideration of a petition will preclude action on a permit application. The new provision will prevent the administrative processing of petitions from being used to impede surface mining operations on lands for which petitioners could earlier have filed petitions. It does not take away the right for citizen participation, but does set limits on the effects the timing of a petition filing [has] on a permit application. The petition process is more a general land-use planning tool than it is a means to make site-specific decisions \* \* \*. Petitioners should be looking ahead to identifying areas which should not be mined, not reacting on a site-by-site basis. \* \* \* This new rule does not mean, however, that important issues will not be considered or that the public will be excluded in the consideration of permits. The permit review process includes means for citizen input and for consideration of important issues." Id. at 41332-41333.

After reviewing all of the information made available to it, OSM finds the following:

1. UEI submitted the initial permit application on December 22, 1998.
2. A permit was subsequently issued on July 27, 2001, and Mining Plan Approval was granted in November of 2001.
3. SUWA filed an objection to the permit on September 4, 2001, and a subsequent hearing before the Utah Board of Oil, Gas, and Mining (Board) reversed the Utah Division of Oil, Gas and Mining's (Division) decision, denying the permit in December of 2001.
4. UEI resubmitted its permit application on February 11, 2002 and the Division required UEI to republish it as a new permit.
5. The Division found the application to be administratively complete on February 25, 2002, and the public notice of completeness was first published in the Sun Advocate on February 28, 2002.
6. An informal conference on the resubmitted permit application package was held on May 21, 2002 and substantial permitting activity ensued as a result.

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7. The protracted permitting activity that occurred between the earlier determination of administrative completeness prompted the Division to make a second administrative completeness determination on March 26, 2004. The public notice of completeness was first published in the Emery County Progress on April 6, 2004.
8. SUWA again requested an informal conference to discuss issues of concern regarding the Division's determination of administrative completeness for the subject permit application package. The informal conference was held on July 7, 2004.
9. Following the informal conference on July 29, 2004, the Director of the Division ordered that the materials submitted by the participants of the conference and the record created at the conference be reviewed and considered by the Division in the normal course of its ongoing review of the new permit for the Lila Canyon Extension of the Horse Canyon Mine.
10. On November 9, 2005, another informal conference was held by the Division to address SUWA's concern that the Division and UEI had still not complied with the Board's 2001 ruling. Among other things, SUWA asserted that the Division had not complied with Section 106 of the National Historic Preservation Act (NHPA). Since the conference was held, DOGM has undertaken initial efforts to comply with the NHPA Section 106 process, though the process has not yet been completed.
11. Since January 13, 2006, SUWA has been actively participating as a "consulting party" in the technical adequacy review of the permit with respect to the NHPA Section 106 process.
12. Maps provided by SUWA in its petition verify that the anticipated area of subsidence lies within the footprint of Permit Area B. An administratively complete application for Permit Area B has been received by the Division and the first newspaper notice published.

The findings illustrate that SUWA has been intimately involved with the proposed Lila Canyon Extension permitting process for nearly five years. It has requested several administrative hearings, conferences, and reviews throughout the process and continues to actively monitor and participate in permitting decisions. Accordingly, SUWA's members have been afforded every opportunity to participate, provide substantial input, and consider important issues throughout the permitting process. Most importantly, however, is the fact that the Division has previously found UEI's Lila Canyon Extension Permit application to be administratively complete and the first newspaper notice has been published. 30 CFR §769.14(g) clearly allows OSM the discretion to not process a petition where an administratively complete permit application has been filed and the first newspaper notice has been published. Considering SUWA's close and lengthy involvement with the Lila Canyon Extension permitting process during the past five



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years, it has had ample opportunity to file an unsuitability petition. To accept and consider SUWA's petition more than two years after the public notice of completeness was first published would constitute an unwarranted delay of mining operations by precluding action on the permit application.

For the reasons discussed above, pursuant to 30 CFR §769.14(g) OSM has determined that it will not process SUWA's petition to designate the Lila Canyon Extension to the Horse Canyon Mine as unsuitable for surface coal mining operations.